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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 695

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ZIFFRIN, INCORPORATED,

Appellant,

vs.

JAMES W. MARTIN, COMMISSIONER OF REVENUE OF THE
COMMONWEALTH OF KENTUCKY, ET AL.,

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF KENTUCKY.

STATEMENT AS TO JURISDICTION.

NORTON L. GOLDSMITH,
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STATUTES CITED.

Alcoholic Beverage Control Law of Kentucky, being c. 2, pages 48, et seq., of the 1938 Session Acts of the General Assembly of the Commonwealth of Kentucky and being Baldwin's 1938 Supplement to Carroll's 1936 Kentucky Statutes, Section 2554b-97, et seq., pages 175, et seq.

Act of Congress of March 3, 1891, c. 517, Sec. 5, 26 Stat. 827, as subsequently amended, including amendatory Acts of Congress of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, being Sec. 238 of Judicial Code, U. S. C. A., Title 38, Sec. 345 and by Act of Congress of June 18, 1910, c. 309, Sec. 17, 36 Stat. 557, as subsequently amended, including amendatory Act of Congress of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938, being Section 266 of the Judicial Code and U. S. C. A., Title 28, Section 380

Constitution of the United States, 14th Amendment

Federal Motor Carrier Act, 1935, Act of Congress of August 9, 1935, C. 498, 49 Stat. 543, U. S. C. A., Title 49, Section 301, et seq.

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Kentucky Motor Vehicle Transportation Act, being c. 104, pages 514, et seq., of the 1932 Session Acts of the General Assembly of the Commonwealth of Kentucky, and being Carroll's Kentucky Statutes, 1936 Edition, Sections 2739j-42, et seq., pages 1457 et seq., as amended by Session Acts of the General Assembly of said Commonwealth, 1936, Fourth Extraordinary Session, Chapter 9, pages 105, et seq., and being Section 2739j-42 of Baldwin's 1938 Supplement to Carroll's 1936 Kentucky Statutes, pages 239, et seq.

SUPREME COURT OF THE UNITED STATES

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**JAMES W. MARTIN, COMMISSIONER OF REVENUE OF THE
COMMONWEALTH OF KENTUCKY, ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF KENTUCKY.**

JURISDICTIONAL STATEMENT.

Filed January 25, 1939

1. The jurisdiction of the Supreme Court of the United States to entertain these appeals is believed to be sustained by Act of Cong. of March 3, 1891, c. 517, § 5, 26 Stat. 827, as subsequently amended, including amendatory Act of Cong. of February 13, 1925, c. 229, § 1, 43 Stat. 938, being § 238 of Judicial Code, U. S. C. A. Title 28, § 345, and by Act of Cong. June 18, 1910, c. 309, § 17, 36 Stat. 557, as

subsequently amended, including amendatory Act of Cong. February 13, 1925, c. 229, § 1, 43 Stat. 938, being § 266 of Judicial Code and U. S. C. A. Title 28, § 380.

2. The Statute of the Commonwealth of Kentucky, the validity of which is involved and drawn in question, is a certain Statute known as and called "Alcoholic Beverage Control Law of Kentucky", being c. 2, pages 48, *et seq.*, of the 1938 Session Acts of the General Assembly of the Commonwealth of Kentucky and being Baldwin's 1938 Supplement to Carroll's 1936 Kentucky Statutes, § 2554b-97, *et seq.*, pages 175, *et seq.*, hereinafter for convenience sometimes called merely "Control Law". By its terms and provisions said Control Law incorporates and integrates as part thereof certain terms and provisions of the Kentucky Motor Vehicle Transportation Act, being c. 104, pages 514, *et seq.* of the 1932 Session Acts of the General Assembly of the Commonwealth of Kentucky, and being Carroll's Kentucky Statutes, 1936 Edition, §§ 2739j-42, *et seq.*, pages 1487, *et seq.*, as amended by Session Acts of the General Assembly of said Commonwealth, 1936 Fourth Extraordinary Session, Chapter 9, pages 105, *et seq.*, and being § 2739j-42 of Baldwin's 1938 Supplement to Carroll's 1936 Kentucky Statutes, pages 239, *et seq.*, hereinafter for convenience sometimes called merely "Transportation Act".

The pertinent provisions of said Control Law, and the pertinent provisions of said Transportation Act, integrated by and with said Control Law as aforesaid, are set forth verbatim in Appendices B and C hereto annexed.

3 The interlocutory orders and decrees and the final judgment sought to be reviewed were entered in the above entitled action on the 22nd day of November, 1938, and the application of the plaintiff for appeals therefrom was presented herein on the 25th day of January, 1938.

4. The nature of this case and action, the nature of the rulings of the Court which were such as to bring this case within the jurisdictional provisions relied upon, a statement of the grounds upon which it is contended that the questions involved are substantial, and citations to the cases believed to sustain the jurisdiction, are next set forth under paragraphs hereof indicated (a), (b), (c) and (d), respectively, to wit:

(a) *Nature of the Case.*—The action, instituted July 18, 1938, in the District Court of the United States for the Eastern District of Kentucky, is one in which the plaintiff, Ziffrin, Incorporated, seeks to obtain interlocutory and preliminary injunctions and a permanent injunction, suspending and restraining the enforcement, operation and execution of the aforesaid Alcoholic Beverage Control Law, a Statute of the Commonwealth of Kentucky, by restraining the action of the defendants, who are public officers of said State, in the enforcement and execution of said Statute. The aforesaid suspension and restraint of enforcement and execution of said Statute and the aforesaid injunctive relief are sought upon the grounds of the unconstitutionality of said Statute in that the same in application to the plaintiff contravenes the Commerce Clause of the Constitution of the United States and the Due Process and Equal Protection Clauses of the Fourteenth Amendment thereto. Said application for said interlocutory injunction was presented to the aforesaid District Court and to the Honorable Mac Swinford, Judge thereof, who thereupon and conformably with the provisions of the Judicial Code, Section 266, called to his assistance a Circuit Judge of the United States and a District Judge to hear and determine said application for said interlocutory and permanent injunctions. Said application for said interlocutory injunction was heard and de-

terminated by said Statutory Three-Judge Court after five (5) days' notice had been given to the Governor and to the Attorney General of the Commonwealth of Kentucky and to the defendants in the action, and the final hearing in said action likewise was had before and was determined by said Statutory Three-Judge Court. The aforesaid orders, decrees and final judgment appealed from denied plaintiff both said interlocutory injunction and said permanent injunction sought in said action, and dismissed said action.

The plaintiff, Ziffrin, Incorporated, is an Indiana corporation, and an interstate contract carrier of freight by motor vehicle for hire, possessed of "grandfather rights" and operating with the sanction and authorization of the Interstate Commerce Commission pursuant to the terms and provisions of Federal Motor Carrier Act, 1935. Act of Cong., Aug. 9, 1935, C. 498, 49 Stat. 543, U. S. C. A., Title 49, § 301, *et seq.* At all times subsequent to January 1, 1935, plaintiff has conducted an established, extensive and profitable business of transporting cargoes of intoxicating liquors, sold by distillers and other vendors having their places of business in Louisville, Jefferson County, Kentucky, and in its immediate environs situated in said Jefferson County, to purchasers domiciled and having their places of business in Indianapolis, Indiana, Chicago, Illinois, and in other places North of Indianapolis, Indiana, for delivery to such purchasers at their respective places of residence and business location and which commodities were transported and delivered by plaintiff to said purchasers pursuant to special contracts of carriage existing between plaintiff and such vendors and vendees. Such of plaintiff's operations as penetrated the territorial confines of Kentucky consisted exclusively in the carriage of interstate exports from Kentucky. In conducting said transport operations, plaintiff used and employed certain Federal Aid Highways, being U. S. Highways Nos. 31, 52 and 41, said

Highways constituting the direct, usual, convenient, and only commercially practical and feasible, motor vehicle route available for said transport operations.

The defendants are the Commissioner of Revenue of the Commonwealth of Kentucky, the Attorney General of the Commonwealth of Kentucky, the members of the Alcoholic Beverage Control Board created by said Control Law, and other persons, all public officers of the Commonwealth of Kentucky charged by law with the duty and responsibility of enforcing said Control Law, which with respect to its license provisions became effective July 1, 1938. Said Control Law prohibits motor carriers from transporting intoxicating liquors within the territorial confines of Kentucky unless said motor carriers hold a liquor Transporter's License issued by said Control Board; further provides that such Transporter's License may be issued only to motor carriers of freight which hold Common Carriers' Certificates issued by the Division of Motor Transportation of Kentucky, and which Common Carriers' Certificates—under the terms and provisions of the aforesaid Transportation Act—are procurable only by motor carriers of freight engaged in the business of common carriers, and which have established to the satisfaction of said Division of Motor Transportation that their operations are convenient and necessary in the public interest.

On July 8, 1938, defendants denied plaintiff's application for such Transporter's License on the ground that on June 30, 1938, said Division of Motor Transportation had denied plaintiff's application for such Common Carrier's Certificate, which last mentioned denial was made and rested upon the ground that plaintiff was not engaged in the business of a common carrier of freight by motor vehicle for hire.

Subsequent to July 1, 1938, defendants threatened to enforce said Control Law's extreme and severe penal, criminal, contraband and confiscatory provisions against plaintiff, its officers, employees, automotive equipment and consigned cargoes, if plaintiff continued to engage in conducting its aforesaid business of carrying interstate exports of liquors from Kentucky. Said threats intimidated plaintiff's aforementioned patrons and customers, who suspended doing business with plaintiff pursuant to said special contracts of carriage. Thereupon, plaintiff instituted this action as aforesaid, wherein plaintiff challenges the validity of said Control Law on the ground that in assuming to deny plaintiff the right to continue to engage in its aforesaid business of transporting exports of liquors from Jefferson County, Kentucky, to points and places situated in Indiana and Illinois as aforesaid in interstate commerce as aforementioned, except upon condition precedent that plaintiff obtain a Common Carrier's Certificate as aforesaid, obtention of which would necessitate (a) that plaintiff convert itself and its business into a common carrier of freight by motor vehicle for hire, and (b) that plaintiff establish to the satisfaction of Kentucky officials that plaintiff's interstate operations are convenient and necessary in the public interest, said Control Law constitutes a direct and substantial burden upon and interference with interstate commerce, deprives plaintiff of its property without due process of law, denies plaintiff the equal protection of the laws, and is in contravention of the Commerce Clause of the Constitution of the United States and in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment thereto.

A Statutory Three-Judge Court was duly convened, pursuant to Section 266 of the Judicial Code, to hear and determine the plaintiff's application for a preliminary and

interlocutory injunction, prayed in the complaint, and application and motion for which were filed by plaintiff on July 26, 1938. In said action plaintiff drew in question the constitutionality of said Control Law as aforementioned, sought and applied for interlocutory and permanent injunctions enjoining and restraining the defendants from enforcing, and from threatening to enforce, said Control Law as aforementioned. Plaintiff pressed its said applications for said interlocutory and permanent injunctions to hearing and determination, and plaintiff was denied all such injunctive relief by the aforesaid order, decree and final judgment mentioned in paragraph numbered 3 hereof.

(b) The rulings of the Statutory Three-Judge Court which heard the case were such as to bring the case within the jurisdictional provisions relied upon, because said rulings consist in (1) an order overruling and denying plaintiff's motion for a preliminary injunction enjoining and restraining defendants from enforcing said Control Law as specified in said motion; (2) an order dissolving the temporary restraining order theretofore granted and theretofore continued and extended in force and effect, which restraining order so continued and extended had the force and effect of a preliminary injunction, and (3) the order and final judgment of said court sustaining the defendants' to dismiss the plaintiff's complaint, denying plaintiff a permanent injunction enjoining the enforcement of said Control Law as aforesaid, and dismissing the plaintiff's complaint as amended.

(c) The questions involved are substantial in that they, and the action itself, directly and necessarily put in issue the validity and constitutionality of the challenged provisions of said Control Law (integrating with itself as it does, the aforementioned provisions of said Transportation Act) because in application to the plaintiff and its aforesaid

exclusively interstate exportation business, said Control Law prohibits and excludes plaintiff from continuing to engage in said business except upon conditions precedent that plaintiff convert itself into a common carrier of freight by motor vehicle and establish to the satisfaction of said Division of Motor Transportation that its said operations are convenient and necessary in the public interest; and thereby said Control Law constitutes a substantial and direct burden upon, and interference with, commerce among the several States, accomplishes a taking of plaintiff's property without due process of law, and discriminates against plaintiff and in favor of common carriers of freight by motor vehicle without the existence of any proper ground for such differentiation, and thereby violates the Commerce Clause of the Constitution of the United States, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment thereto.

The cases showing the questions involved to be substantial as aforesaid are: *Michigan Pub. Util. Comm. v. Duke*, 266 U. S. 570, 69 L. Ed. 445; *Buck v. Kuykendall*, 267 U. S. 307, 69 L. Ed. 623; *Bush & Sons Co. v. Maloy*, 267 U. S. 317, 69 L. Ed. 627; *Frost Trucking Co. v. Railroad Com.*, 271 U. S. 583, 70 L. Ed. 1101; *Smith v. Cahoon*, 283 U. S. 553, 75 L. Ed. 1264; *Allen v. Galveston Truck Line Corp.*, 289 U. S. 708, 77 L. Ed. 1463.

(d) The cases believed to sustain the jurisdiction of the Supreme Court to entertain these appeals are: *Shaffer v. Carter*, 252 U. S. 37, 64 L. Ed. 445; *Packard v. Banton*, 264 U. S. 140, 68 L. Ed. 596; *Pacific Tel. & Tel. Co. v. Kuykendall*, 265 U. S. 196, 68 L. Ed. 975; *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570, 69 L. Ed. 445; *Buck v. Kuykendall*, 267 U. S. 307, 69 L. Ed. 623; *In Re Buder*, 271 U. S. 461, 70 L. Ed. 1036; *Interstate Busses Corp. v. Holyoke Street R. Co.*, 273 U. S. 45, 71 L. Ed. 530; *Clark v.*

Poor, 274 U. S. 554, 71 L. Ed. 1199; *Morris v. Doby*, 274 U. S. 135, 71 L. Ed. 966; *Interstate Busses Corp. v. Blodgett*, 276, U. S. 245, 72 L. Ed. 551, *Continental Baking Co. v. Woodring*, 286 U. S. 352, 76 L. Ed. 1155; *Kroger Grocery & Baking Co. v. Lewis*, (heard and reported with *Stewart Dry Goods Co. v. Lewis*.) 287 U. S. 9, 77 L. Ed. 135; *Allen v. Galveston Truck Line Corporation*, 289 U. S. 708, 77 L. Ed. 1463; *Spielman Motor Sales Co. v. Dodge*, 295 U. S. 89, 79, L. Ed. 1322; *Bingaman v. Golden Eagle Western Lines*, 297 U. S. 626, 80 L. Ed. 928; *South Carolina State Highway Department v. Barmwell Bros.*, 303 U. S. 177, 82 L. Ed. 469.

(5) It is claimed that the Statutory Three-Judge Court abused its discretion in denying the interlocutory injunction aforementioned only in that said court erred in holding said Control Law valid and constitutional, despite said Law's inherent infirmities hereinabove specified.

(6) On the 25th day of January, 1939, plaintiff filed in said District Court its petition for appeals from said interlocutory orders and decrees and from said final judgment to the Supreme Court of the United States, its assignment of errors, its appeal bond, with good and sufficient surety thereon, and this Jurisdictional statement, and presented the same to Honorable Mac Swinford, Judge of said District Court, and said District Court thereupon entered an order filing the papers last mentioned, approving said appeal bond and the surety thereon, allowing said appeals, and ordering that citation issue, and said order was duly signed by said Honorable Mac Swinford, Judge of said court, who, upon allowance of said appeals, duly issued and signed proper citation bearing *teste* dated the date last mentioned and citing and admonishing said defendants to appear in the Supreme Court of the United States within forty (40) days from said date to show cause why said orders, decrees and judgment so appealed from should not be corrected.

(7) The plaintiff appends hereto, marked "Appendix A," a copy of the aforesaid Statutory Three-Judge Court's opinion dated and filed October 15, 1938, which by the terms and provisions of the final judgment appealed from has been constituted and made said court's statement of its conclusions of law constituting the sole grounds for the court taking the action and making the rulings and decisions complained of upon these appeals.

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APPENDIX "A".

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY, FRANKFORT.

No. 1210.

ZIFFRIN, INCORPORATED, *Plaintiff*,*vs.*JAMES W. MARTIN, etc., *et. al.*, *Defendant*.**Opinion.**Before Hamilton, Circuit Judge, and Nevin and Swinford,
District Judges.SWINFORD, *District Judge*:

The plaintiff, Ziffrin, Incorporated, filed its bill of complaint against the officers charged with the responsibility of enforcing the liquor control laws of the State of Kentucky, and seeks to enjoin the enforcement of the provisions of the Alcoholic Beverage Control Law of Kentucky.

The defendant filed a motion to dismiss the plaintiff's bill.

The question for determination is the constitutionality under the federal constitution of the Alcoholic Beverage Control Law of Kentucky, enacted at the 1938 session of the General Assembly.

It is alleged that since March 20, 1933, and at all of the times involved, the plaintiff, Ziffrin, Incorporated, has been and is an Indiana corporation, domiciled at Indianapolis, Indiana, authorized by its charter to engage, and actually engaged, in the business of an interstate contract carrier of freight by motor vehicle for hire.

On July 1, 1935, and prior thereto, plaintiff was in bona fide operation as a contract carrier by motor vehicle between Louisville, Kentucky, and Chicago, Illinois, and elsewhere, conducting operations in interstate commerce along and over Federal Aid Highway, U. S. No. 31, from Louis-

ville northwardly. On September 30, 1935, the Interstate Commerce Commission properly extended to and including February 12, 1936, the time within which interstate contract carriers might file applications for permit. Prior to February 12, 1936, plaintiff filed application with the Interstate Commerce Commission for a permit as an interstate contract carrier of freight for the aforementioned territory and route, which application has continued, and now continues, pending and undetermined before the Interstate Commerce Commission, with the consequence under Federal Motor Carrier Act, 1935 (U. S. C. A., Title 49, Sec. 309), that the continuance of plaintiff's operations has been and is lawful.

In October and November, 1936, plaintiff entered into contracts with Schenley Products Company and Joseph E. Seagram & Sons, Inc., and their affiliates, all engaged in the business of whiskey distillers, to transport for hire by motor vehicles consignments of whiskeys to be delivered by said bailors to the plaintiff in Louisville, Kentucky, consigned by bailors for delivery to the consignee-purchasers of said whiskeys at such consignees' places or residence or business location in Chicago, Illinois, and in points other than the State of Kentucky. These contracts have continued to be and are in full force and effect; the plaintiff has carried large quantities of whiskeys pursuant thereto and conformably therewith and plaintiff has done like and similar business with and for other customers.

The direct, convenient and usual motor vehicle route from Louisville to Chicago is via Indianapolis over U. S. Highway No. 31, and that route has been used and employed by plaintiff in its operations.

The transportation of this whiskey has been the principal part of plaintiff's business and that business has been and is an established and profitable one.

The business has been interstate commerce exclusively.

During the year preceding July 1, 1938, plaintiff owned and operated seven trucks, operated a total of twenty-five trucks, employed forty men, and had in the business a capital investment in excess of \$10,000.00.

On March 7, 1938, the Governor of Kentucky approved the Alcoholic Beverage Control Law known as Carroll's Kentucky Statutes, Sec. 2554b-97, *et seq.*

Plaintiff previously had complied with all requirements of Kentucky laws governing licenses, certificates and process agent.

Insofar as its license provisions are concerned, this law became effective July 1, 1938, and it thereupon became incumbent upon plaintiff, if it were to continue its aforementioned business conformably with the terms of the law, to have a Transporter's License. 1938 Supplement to Carroll's Kentucky Statutes Sec. 2554b-190.

Section "18" of the Act, referred to in this Statute is subsection 7 of Section 2554b-114, Carroll's Kentucky Statutes.

In order to be eligible to obtain the Transporter's License from the Department of Revenue, it was necessary for plaintiff to have a common carrier's certificate from the Division of Motor Transportation. 1938 Supplement to Carroll's Kentucky Statutes, Sec. 2554b-154 (7).

On May 25, 1938, plaintiff applied for a Liquor Transporter's License, paid the required fee, and with surety executed the bond required therefor, and on June 7, 1938, plaintiff applied to Division of Motor Transportation for a common carrier's certificate to operate a motor freight line from Louisville, Kentucky, to the Indiana State line over U. S. Highway No. 31, and in interstate commerce only.

On or about June 30, 1938, plaintiff's application for a common carrier's certificate was denied; plaintiff thereby was rendered ineligible to obtain or to receive a Transporter's License and on July 8, 1938, the Commissioner of Revenue and the Alcoholic Beverage Control Board denied the application for a Transporter's License on the ground that it did not hold a common carrier's certificate.

The Bill charges the law to be unconstitutional insofar as it assumes to bar plaintiff from engaging in interstate commerce as a contract carrier. The Bill, as amended, charges the law to contravene the Commerce Clause, the Due Process and Equal Protection Clauses.

Counsel for the plaintiff contend that this statutory three judge court has no jurisdiction to entertain the motion to dismiss. An examination of the cases cited to support this plaintiff's claim reveals that two of them were decisions rendered before Section 266 of the Judicial Code (Title 28 U. S. C. A. Sec. 280) was amended in 1925. This amendment added the last sentence to Section 266 of the Judicial Code (28 U. S. C. A. § 380), which is as follows: "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

The amendment expressly states that the three judge court must sit in final hearing and hence grant a final decree.

The Supreme Court, in the case of *Stratton, etc. v. St. Louis Southwestern Ry. Co.*, 282 U. S. 10, 14, said: "By the amendment of February 13, 1925 (43 Stat. 938); the provision with respect to the presence of three judges was made to apply to the final hearing in such suit in the District Court, and from the final decree, granting or denying a permanent injunction, a direct appeal lies to this court." * * * "These purposes were not altered by the amendment of the statute, which was designed to end the anomalous situation in which a single judge might reconsider and decide questions already passed upon by these judges on the application for an interlocutory judgment."

Under the Act, as amended, the three judge court has the same power as a single district judge. It is in fact a district court composed of three judges instead of one. One of the questions for determination is the sufficiency of the pleadings to state a cause of action. The only way in which this can be determined is to decide whether or not the Kentucky Statute is constitutional.

We are of the opinion that this three judge court has authority to rule upon this motion to dismiss.

If this Act of the Kentucky Legislature does not violate the guarantees under the federal constitution to those engaged in interstate commerce it is valid only because it is a

reasonable exercise of the police power of the sovereign State of Kentucky.

The legislature determines what regulations are proper and necessary in the exercise of the police power and it is not for the courts to pass upon the wisdom, policy or expediency of the laws passed in exercising this sovereign power. *Halter v. Nebraska*, 205 U. S. 34. In this case Mr. Justice Holmes in the opinion laid down the basic rule of construction in the following language: "In our consideration of the questions presented we must not overlook certain principles or constitutional construction, long ago established and steadily adhered to, which preclude a judicial tribunal from holding a legislative enactment, Federal or state, unconstitutional and void, unless it be manifestly so. Another vital principle is that, except as restrained by its own fundamental law, or by the Supreme Law of the Land, a State possesses all legislative power consistent with a republican form of government; therefore each State, when not thus restrained and so far as this court is concerned, may, by legislation, provide not only for the health, morals and safety of its people, but for the common good, as involved in the well-being, peace, happiness and prosperity of the people."

It then becomes the duty of the courts to determine what are proper subjects for the exercise of this power, what constitutional restrictions and limitations must be applied and whether the statute in question is a reasonable exercise of the power. In this connection the courts may apply certain tests to the legislation and may judicially determine whether the law has a real and substantial relation to the public welfare, safety and health and actually tends in some real degree to promote these objects. *Mugler v. Kansas*, 123 U. S. 623.

The basis of the police power lies in the constitution which regards the public welfare, safety and health of the citizens of that state. However, a close examination of the authorities will show that whenever there is a conflict between the police power and the constitution the courts will construe the constitution to fit in with the police regulations if at all reasonable.

In the case of *Townsend v. Yeomans*, 301 U. S. 441, the court said: "The case calls for the application of the well established principle that Congress may circumscribe its regulation and occupy a limited field, and that the intent to supersede the exercise by the State of its police power as to matters not covered by the federal legislation is not to be implied unless the latter fairly interpreted is in actual conflict with the state law. *Savage v. Jones*, 225 U. S. 501, 533; *Atlantic Coast Line v. Georgia*, 234 U. S. 280, 293, 294; *Illinois Central R. Co. v. Public Utilities Comm'n*, 245 U. S. 493, 510; *Carey v. South Dakota*, 250 U. S. 118, 122; *Lehigh Valley R. Co. v. Public Utilities Comm'n*, 278 U. S. 24, 35; *Atchison, T. & S. F. Ry. Co. v. Railroad Comm'rs*, 283 U. S. 380, 392, 393; *Hartford Indemnity Co. v. Illinois*, 298 U. S. 155, 158."

The expressly granted power of the federal government to regulate interstate commerce and the power of the individual states to enact regulations for their internal police are coordinate powers which each must respect. The states jealously guard the prerogative duty of protecting the public safety, health and morals. Courts have consistently recognized this right. Necessarily the progress of time has broadened rather than limited the construction placed upon the commerce clause of the Constitution. The fundamental law vitalized by the vigorous opinion of Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheaton 1, has been consistently adhered to and extended. In the light of intervening events any other interpretation would appear almost absurd. If progress is to continue future generations looking back upon this period must find the courts equally as farsighted and practical.

The Courts with equal consistency have respected the right of the states as the proper governmental agency, to enact and enforce reasonable police regulations. Under our dual system of government both are equally necessary and must be preserved entire, but neither can be so exercised as to materially affect or encroach upon the other. State laws, not primarily aimed at commerce, but intended as legitimate exertions of the authority of the state to provide for the public safety, health and morals of the

citizens of that state are not invalid because they may remotely or incidently impose restrictions on interstate commerce. *Sherlock v. Alling*, 93 U. S. 99.

The question whether the power of Congress to regulate interstate commerce is exclusive or whether the states have a concurrent authority to any extent, over the same subject is the most difficult which has arisen in the construction of this clause of the Constitution. An examination of the authorities might reveal a division into four classes of guiding rules.

First the states cannot lawfully enact measures tending directly to regulate, obstruct or interfere with such commerce as is confided to the paramount control of Congress or which may be inconsistent with the legislations of Congress on the same subject. I think it is within this first class that the Minnesota Rate Cases (*Simpson v. Shepard*) 230 U. S. 352, 57 L. Ed. 1511, cited by counsel for plaintiff fall. See opinion giving many illustrations.

Second, if the particular subject to which the power is to be directed is national in its character or is such that it can properly be regulated only by a uniform system, to such an extent that varying regulations by the individual states would cause inconvenience and be a detriment, it is not competent for the states to legislate on the subject, and if Congress does not act, its silence is to be taken as an evidence of its will that the subject shall be free from all regulation and restriction.

The rule is laid down in the case of *Sligh v. Kirkwood*, etc., 237 U. S. 52, 58. "That Congress has the exclusive power to regulate interstate commerce is beyond question, and when that authority is exerted by the State, even in the just exercise of the police power, it may not interfere with the supreme authority of Congress over the subject; while this is true, this court from the beginning has recognized that there may be legitimate action by the State in the matter of local regulation, which the State may take until Congress exercises its authority upon the subject. This subject has been so frequently dealt with in decisions of this court that an extended review of the authorities

is unnecessary. See the Minnesota Rate Cases, 230 U. S. 352."

The same rule of law is emphasized in the more recent case of *Townsend v. Yeomans*, *supra*, in which it was said: "We find it unnecessary to pass upon the authority of the Congress to regulate the charges of the warehousemen, for we are of the opinion that, if it be assumed that Congress has that authority, it has not been exercised and in the absence of such exercise the State may impose the regulation in question for the protection of its people."

Third, state legislatures may regulate matters local and limited and which are most likely to be wisely provided for by such diverse rules as the authorities of the different states may deem applicable to their localities and on which Congress has not expressly legislated. *Cooley v. Board of Wardens*, etc., 12 How. 299; *United States v. Adair*, 152 Fed. 727.

Fourth, there are certain classes of state legislation which, although they may incidentally or remotely affect interstate commerce, are not intended as regulations thereof, but have their primary concern for the public health, safety, and welfare of the citizens of the particular state and which are properly in the nature of police regulations. If these laws are reasonable and bona fide and there is no Act of Congress expressly covering the same ground, they are valid. And it is understood that in so far as they relate to or affect commerce Congress, by refraining from acting on the same subject, sanctions and adopts them. It is within this fourth class, if any, that the case at bar falls.

By the Webb-Kenyon Act, 27 U. S. C. A. 122, passed in 1913, Congress recognized a condition which only national legislation could meet. To prevent the importation of liquor from a "wet" state into a "dry" state an adequate and complete law was enacted.

Prior to this in 1890, Congress had enacted the Wilson Act, 27 U. S. C. A. 121.

From these enactments and the construction placed upon them by the courts it is seen that Congress has carefully considered the interstate shipment of liquor and has ex-

pressly avoided enacting legislation dealing with the shipping of liquor out of a state as is the case at bar.

Counsel for the defendants insist that this case is covered by the wording of the Webb-Kenyon Act.

This Act provides: "The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

The defendants insist that this language expressly gives the states a right to enact legislation pertaining to the exportation of liquor and cite as their authority the case of *Commonwealth v. One Dodge Motor Truck*, 326 Pa. 120, 191 Alt. 590, 110 A. L. R. 919.

In this case the Pennsylvania court construed the Webb-Kenyon Act as giving this right to the states in express terms. In the opinion it said: "While the Webb-Kenyon Act was primarily aimed at the importation of intoxicating liquors into a state, in violation of the laws of that state, it also includes in express terms the interstate transportation of all liquor 'in any manner used . . . in violation of any law of such State.'" 27 U. S. C. A. § 122. We have no doubt of the state's power to condemn and forfeit both the liquors so unlawfully transported and the vehicle used in such unlawful transportation."

With this construction of the Webb-Kenyon Act we cannot agree. This Act was passed in our judgment to deal wholly with importation.

It is interesting to note the history of this class of federal legislation. In 1887 the Supreme Court in the case of *Bowman v. Chicago and Northwestern Railway Company*, 125 U. S. 465, laid down the rule that a statute of a state prohibiting the sale of any intoxicating liquors, except for pharmaceutical, medicinal, chemical or sacramental purposes, under a license from a county court of the State, is, as applied to a sale by the importer, and in the original package or kegs, unbroken and unopened, of such liquors manufactured in and brought from another state, unconstitutional and void, as repugnant to the clause of the Constitution granting to Congress the power to regulate commerce with foreign nations and among the several states.

This was followed in 1889 in the case of *Leisy v. Hardin*, 135 U. S. 100.

In 1890, apparently as an outgrowth of these two decisions, Congress enacted the Wilson Act, 27 U. S. C. A. 121, which provides as follows: "All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Following this was the Webb-Kenyon Act in 1913. This Act was held not to have been repealed by the National Prohibition Act nor the Eighteenth Amendment under which it was enacted, in *McCormick & Co., v. Brown*, 286 U. S. 131, 52 Sup. Ct. 522; 76 L. Ed. 1017; 87 A. L. R. 448.

The Twenty-first Amendment provides in Section 2: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

In the light of the authorities cited, it can well be reasoned that where Congress has legislated upon importation,

had this important subject before committees and under debate and deliberately failed to enact legislation dealing with exportations in interstate commerce it has thereby deliberately invited each state to make its own laws governing this particular field evidently acutely conscious of the fact that each state was better qualified to give its own citizens the character of laws which applied to the local problems.

This is a most practical matter and must be dealt with in a practical way.

Modern means of transportation are so efficient that state police powers should be broadened rather than more narrowly confined. What is a reasonable regulation today may have been an unreasonable regulation in the days of dirt roads and horse drawn vehicles.

With broad, well paved highways and high powered motor vehicles, with airplanes and open airways, by both means of which large quantities of intoxicating liquors can be transported across state lines in a short space of time, it becomes a practical impossibility to accurately check the output of plants engaged in its manufacture. It cannot therefore be said to be unreasonable to require its transportation to the state line by regularly engaged transportation services, with fixed termini and maintaining definite schedules for handling shipments of goods. While it may be suggested and has been inferred by plaintiff's counsel that this law was enacted to give some particular class engaged in the transportation business an advantage over those of the same class as his client, this cannot be said to reflect upon the reasonableness of the regulation itself. We must presume that the legislature sought to enact a measure which it believed to be for the good of the state and its citizens, and are here called upon to pass upon the constitutionality of the legislation, not upon the motives of the majority of the members of the legislature and the Governor who signed the bill.

The cases cited by counsel for the plaintiff and relied upon by them treat principally with the general rules of interstate commerce. We think it is well for us to confine ourselves to the cases dealing with the particular

product involved herein. That of alcoholic beverages. The celebrated case of *Mugler v. Kansas*, 123 U. S. 623, emphasizes this fact. The Supreme Court in its opinion reviewed many authorities and had this to say: "In the License Cases, 5 How. 504, the question was, whether certain statutes of Massachusetts, Rhode Island, and New Hampshire, relating to the sale of spirituous liquors were repugnant to the Constitution of the United States. In determining that question, it became necessary to inquire whether there was any conflict between the exercise by Congress of its power to regulate commerce with foreign countries, or among the several States, and the exercise by a State of what are called police power. Although the members of the court did not fully agree as to the grounds upon which the decision should be placed, they were unanimous in holding that the statutes then under examination were not inconsistent with the Constitution of the United States, or with any act of Congress. Chief Justice Taney said: "If any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether if it thinks proper."

Here is a product which is generally recognized by its nature to be peculiarly subject to regulation under the police power. It is wholly within the territorial boundaries of the state, not yet placed in interstate commerce and must be regulated by some authority. There is no federal regulation. There is no Act of Congress prescribing the method or agency through which it may be transported over the highways or rights-of-ways within the borders of the state. The lack of national legislative control is conspicuous.

We think the language of the Supreme Court in the case of *Sherlock v. Alling*, etc., 93 U. S. 99, might be applied to the case at bar. "In supposed support of this position numerous decisions of this court are cited by counsel, to the effect that the States cannot by legislation place burdens upon commerce with foreign nations or among the several states. The decisions go to that extent, and their sound-

ness is not questioned. But, upon examination of the cases in which they were rendered it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or executed a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on."

Further on in the opinion the Court said: "But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the State to which the vessels belong; and it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or inter-State, or in any other pursuit."

"That the regulation of the manufacture and sale of intoxicating liquors is a proper subject for the exercise of the police power, is a proposition which has never been doubted. On all grounds which are recognized as most safely and surely bringing a matter within the scope of this power, the production and selling of intoxicants is included within the sphere of its legitimate operations. Whatever form, therefore, the regulating or restricting law may assume, if it is not in contravention of some constitutional provision, it is to be sustained as valid on this ground. This has been the decision in regard to laws totally prohibiting the manufacture and sale of liquors, laws allowing such

prohibition to particular parts of the state at their option, laws licensing the traffic in liquors, regulating or prohibiting the sale on certain days or in certain places or to particular classes of persons, authorizing the search for and seizure of liquors illegally kept for sale, imposing special or punitive taxation upon the business, and laws giving a right of action in damages to persons injured as a consequence of particular sales against the persons making such sales." Black's Constitutional Law, Third Series, pg. 402.

Since intoxicating liquor is universally recognized as a legitimate subject over which the states may exercise their police power, even to the extent of denying the right to manufacture, it cannot be consistently held that they may permit it to be manufactured, but then lose complete control of what is done with it.

If the state can arbitrarily grant or withhold the right to manufacture liquor on the theory that the nature of the product was something that authorized strong regulation, then that regulation should certainly continue so long as the admittedly dangerous element is within the borders of the state. It does not lose its dangerous element by being merely labeled for exportation to a foreign state or country, even though it might incidently interfere with interstate commerce.

It is an absurdity to say that Kentucky can control its liquor output but cannot control its distribution. The reason for one applies with triple force to the other. There are hundreds of independent trucks operating in Kentucky under a contract carrier's license. They have no schedule, no fixed route, and no definite termini. It would be an impossibility to determine the quantity or destination, whether within or without the State of Kentucky, if distillers could call a passing truckman and make a private contract for hauling each load of liquor. Assuming that liquor, uncontrolled, is a dangerous element to the health, morals and welfare of the citizens of Kentucky, there appears no greater means by which Kentucky could mistreat her citizens than to permit the manufacture and sale of liquor but have nothing to say about its handling while within the borders of the state.

The Pennsylvania Supreme Court, in the case of *Commonwealth v. One Dodge Motor Truck*, *supra*, in this connection said: "The foregoing decisions leave no doubt that the Commonwealth of Pennsylvania has the power to prohibit the manufacture of alcoholic liquors within its borders. And this is so, even though such liquors are intended for shipment only out of the state. *Kidd v. Pearson*, 128 U. S. 1, 9 S. Ct. 6, 32 L. Ed. 346. The power to prohibit absolutely includes the power to prohibit conditionally, or to impose reasonable regulations or conditions on such manufacture. *Eberle v. Michigan*, 232 U. S. 700, 34 S. Ct. 464, 58 L. Ed. 803; *Com. v. Vigliotti*, 271 Pa. 10, 115 A. 20, affirmed *Vigliotti v. Pennsylvania*, 258 U. S. 403, 42 S. Ct. 330, 66 L. Ed. 686; *Com. v. Stofchek*, *supra*. "The greater power includes the less."—*Seaboard Air Line Ry. v. North Carolina*, *supra*. It is common knowledge that the successful administration of statutes prohibiting or regulating the traffic in intoxicating liquors depends on the ability of the state to enforce them; and the state's success in enforcing such laws is in direct proportion to its ability to control the transportation and delivery of the liquors. The state will have comparatively little trouble in enforcing its statutes prohibiting the manufacture, sale, and possession of illegal or bootleg liquors, if it can control their transportation and delivery; and the transportation and delivery by automobiles, motor-trucks, and motor vehicles constitute the greatest difficulty. This was recognized by the Supreme Court of the United States in *United States v. Simpson*, *supra*, where the opinion writer, Mr. Justice Van Devanter, said, speaking of the "Reed Amendment", *supra*: "Had Congress intended to confine it to transportation by railroads and other common carriers it may well be assumed that other words appropriate to the expression of that intention would have been used. And it also may be assumed that Congress foresaw that if the statute were thus confined it could be so readily and extensively evaded by the use of automobiles, auto-trucks and other private vehicles that it would not be of much practical benefit." 252 U. S. 465, at page 467, 40 S. Ct. 464, 64 L. Ed. 665, 10 A. L. R. 510."

We are of the opinion that this is a valid and reasonable regulation under the police power and does not contravene the Commerce, Due Process or Equal Protection Clauses of the Federal Constitution.

The action should be dismissed.

(Signed)

MACSWINFORD,

Judge, Eastern & Western Districts of Kentucky.

APPENDIX "B".

Pertinent provisions of: ALCOHOLIC BEVERAGE CONTROL LAW OF KENTUCKY (being Chapter 2, pages 48, et seq., of 1938 Session Acts of General Assembly of the Commonwealth of Kentucky, approved and effective March 7, 1938, and being Baldwin's 1938 Supplement to Carroll's 1936 Kentucky Statutes, Sec. 2554b-97, et seq., pages 175, et seq.).

"§ 1. Short Title.—This Act shall be known and may be cited and referred to as the "Alcoholic Beverage Control Law."

"§ 2. (1). 'Alcohol' means and includes ethyl alcohol, hydrated oxide of ethyl or spirit of wine, from whatever source or by whatever process produced.

(2) 'Alcoholic Beverage' or 'Beverage' means and includes alcoholic spirits, liquor, rum, wine, beer, ale, porter, stout, and every liquid or solid patented or not, containing alcohol in an amount in excess of that now permitted or that may hereafter be permitted under Chapter I of the Acts of the General Assembly of 1936, known as the Local Option Law, or any amendment thereof, and capable of being consumed by a human being and every spurious or imitation liquor sold as, or under any name commonly used for alcoholic beverages, whether containing any alcohol or not. Provided that there is excepted from this definition of alcoholic beverages the following products if they are unfit for use for beverage purposes: (a) medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopoeia, national formulary or the

American Institute of Homeopathy; (b) patented, patent and proprietary medicines; (c) toilet, medicinal and antiseptic preparations and solutions; and (d) flavoring extracts and syrups.

(4) 'Board' or 'State Board' or similar abbreviation used herein means the Kentucky State Alcoholic Beverage Control Board created by this Act.

"(10) 'Commissioner' means the Commissioner of Revenue of the Commonwealth of Kentucky."

"(12) 'Department' means the Department of Revenue of the Commonwealth of Kentucky."

"(16) 'Field Representative' means and includes all employees or agents of the Department of Revenue who are regularly employed and whose primary function is to travel from place to place for the purpose of visiting taxpayers and all employees or agents of said Department who may be assigned, temporarily or permanently, by the Commissioner to duty outside of the main office of the Department at Frankfort, in connection with the administration of this Act."

"(17) 'License' means and includes any license issued pursuant to this Act."

"(18) 'Licensee' means and includes any person to whom a license has been issued pursuant to this Act."

"(19) 'Liquor' means and includes all alcoholic beverages."

"(22) 'Person' means and includes individual, partnership, joint stock company, business, trust, association, corporation or other form of business enterprise, including a receiver, trustee or liquidating agent."

"(28) 'Spirits' or 'Distilled Spirits' means and includes any product capable of being consumed by a human being which contains alcohol in excess of the amount now permitted or that may hereafter be permitted by Chapter I of the Acts of the General Assembly of 1936, known as the Local Option Law, or any amendment thereof, obtained by distilling,

mixed with water or other substances in solution, except wine as herein defined."

"§ 3. Functions.—The administration of this Act and the regulation of the traffic in alcoholic beverages in this Commonwealth is hereby vested in the Department of Revenue."

"§ 4. Organization.—(a) The administration of this Act in relation to traffic in distilled spirits and wine shall be in charge of a distilled spirits unit, under the supervision of the Commissioner of Revenue. (b) The administration of this Act in relation to traffic in malt beverages shall be in charge of a malt beverage unit, under the supervision of the Commissioner of Revenue."

"§ 5. Administrators: Salaries.—The distilled spirits unit and the malt beverage unit shall each be headed by an Administrator appointed by the Commissioner of Revenue. The salaries of said Administrators shall be fixed by the Commissioner of Revenue in accordance with Section 4618-154 (Reorganization Bill) of Carroll's Kentucky Statutes, 1936 edition, and they shall be exempt from the test provided for in Section 4618-90 (Reorganization Bill) of Carroll's Kentucky Statutes, 1936 edition."

"§ 6. Powers and Duties of Administrators.—The Administrators, subject to the supervision and control of the Commissioner, shall exercise severally any of the functions, powers and duties conferred upon the Department by law, which the Commissioner may delegate to them. The Administrator of the distilled spirits unit shall have authority to issue or refuse to issue any license provided for in this Act authorizing traffic in distilled spirits and wine; and the Administrator of the malt beverage unit shall have authority to issue or refuse to issue any license provided for in the Act authorizing traffic in malt beverages."

"§ 7. Alcoholic Beverage Control Board; Creation; Functions; Limitations.—The Kentucky Tax Commission shall constitute the Alcoholic Beverage Control Board, which shall have the following functions, powers and duties;

(1) To adopt reasonable regulations governing the conduct of its own business and the procedure relative to appli-

cations for and revocations of licenses and relative to all other matters over which the Board is given jurisdiction by this Act, and for the supervision and control of the manufacture, sale, transportation, storage, advertising, and trafficking of alcoholic beverages throughout the Commonwealth. Such rules and regulations need not be uniform in their application, but may vary in accordance with reasonable classifications.

(2) To limit in its sound discretion the number of licenses of each kind or class to be issued in this Commonwealth or within any political subdivision thereof, and to restrict the locations of licensed premises. To this end the Board may divide and subdivide this Commonwealth or any political subdivision thereof into sections or districts, provided the classification be reasonable, and the rules and regulations relating to the granting, refusal and revocation of licenses may be different within the several divisions or subdivisions so created." * * *

"§ 9. Powers of Members, Officers and Employees.—The Administrators and all Field Representatives shall have full police powers such as are now vested in sheriffs and other peace officers, provided the jurisdiction of said Administrators and Field Representatives shall be co-extensive with the boundaries of the Commonwealth. They shall have authority to inspect or examine any premises where alcoholic beverages are manufactured, sold, stored or otherwise trafficked in, without first having obtained a search warrant; and shall have authority to confiscate any contraband property."

"§ 13. Legal Counsel for Board.—The Attorney General of this Commonwealth shall, subject to the approval of the Commissioner of Revenue, appoint an additional assistant Attorney General whose sole duty shall be to act as legal counsel for the distilled spirits unit and the malt beverage unit. The Assistant Attorney General appointed under this section shall be paid from the Department of Revenue appropriation, an annual salary not to exceed four thousand dollars."

“§ 18. Expiration Date of Licenses; License Taxes.—All licenses issued under this Act shall expire on June 30th of each year. There shall be the following kinds of licenses, each of which shall be printed so as to be readily distinguishable from each other, to wit: . . .

(7) License to transport distilled spirits and wine to or from any point in Kentucky, the fee for which shall be \$10 per annum.”

“§ 27. Business Authorized Under a Transporter's License.—A Transporter's License shall authorize the holder to transport distilled spirits and wine to, or from the licensed premises of any licensee under this Act, provided both the consignor and consignee in each case are authorized by law of the states of their residence, respectively, to sell, purchase, ship, or receive the alcoholic beverages, as the case may be.”

“§ 33. Applications for Licenses; Issuance of Same.—Applications for any license provided for in section 18 of this Act shall be made to the Administrator of the Distilled Spirits Unit at his office in Frankfort, Kentucky; shall be in writing on forms furnished by the Department of Revenue, and verified; and shall set forth in detail such information concerning the applicant and the premises for which the license is sought as this Act or the State Board shall by regulation require. Said application shall be accompanied by a certified check, or cash, or a postal or express money order for the amount of money required by this Act for a license of the kind applied for. If the Administrator shall grant the application he shall issue the proper license in such form as shall be determined by the State board by regulation, subject to the provisions of section 38 of this Act. No license except those provided in sub-sections 6 and 8 of section 29 of this Act shall be issued in less than twenty days or delivered in less than thirty days from the time the application and remittances were received by the Department of Revenue.”

“§ 52. No Traffic in Alcoholic Beverages Save Under License.—It shall be a criminal offense for any person to

manufacture, store, sell, purchase, transport or otherwise in any manner traffic in alcoholic beverages as that term is defined in this Act, without first having paid to the Department of Revenue at its office in Frankfort, the license tax required by this Act, and without first having obtained the license required by this Act.

"In addition to the criminal penalty prescribed for violation of this section, it is explicitly provided that, as often as any person shall manufacture, store, sell, purchase, transport or otherwise traffic in alcoholic beverages without first having paid to the Department of Revenue at its office in Frankfort the license tax required by this Act, said person shall be required to pay said license for the full year notwithstanding that no license shall be issued, together with a penalty equal to twenty (20) per cent of said license tax."

"§ 53. Declaring Certain Property Contraband; Providing for Its Disposition.—The following property is hereby declared to be contraband;

.

(2) Any spirituous, vinous or malt liquors in the possession of any one not entitled to possession of the same under the provisions of this Act.

.

(6) Any motor vehicle, water or air craft, or other vehicle in which any person is illegally possessing or transporting alcoholic beverages.

Any peace officers, including the Administrators, and field representatives of the Department of Revenue are hereby authorized to seize, without warrant, any of the property declared to be contraband under this section and to hold the same subject to the order of the court before which the owner or one in possession of such property has been arraigned. Upon conviction of the defendant the court shall enter an order vesting title in all the contraband property in the Alcoholic Control Board, subject to the right of any owner or lienor of property in sub-section six above, whose lien is of record to intervene and establish his rights

in such property by providing that the property was being used in connection with traffic in alcoholic beverages without the knowledge, consent or approval of such owner or lienor. If the owner of the property does so prove, the court shall order the property restored to such owner. If the lienor so proves the court shall order a sale of the property at public auction. The expenses of keeping and selling the same, and of all valid recorded liens which are established by intervention as being bona fide shall be paid out of the proceeds of the sale. The balance shall be paid into the State Treasury and be credited to the General Expenditure Fund. The Court shall order all sales under this Act in which lienors have an interest to be made by the sheriff who shall receive and be allowed the same fees as allowed for sales under execution. If the defendant be acquitted no property seized as contraband in connection with the arrest of the defendant shall be ordered returned or restored unless the person from whose possession same was taken proves that he was in lawful possession of said property. If the owners of any contraband seized under this Act cannot be located within ninety days, and during that time shall fail to appear and claim such contraband, or if such owner appears and agrees, title to such contraband shall immediately vest in the State Alcoholic Control Board."

"§ 54 (7) A Transporter's License as provided for in section 18 (7) of this Act shall be issued only to persons who are authorized by proper certificate from the Division of Motor Transportation in the Department of Business Regulation to engage in the business of a common carrier."

"§ 89. Transportation by Non-Licensee Prohibited; Exception.—No person except a railroad company or railway express company shall transport or cause to be transported any distilled spirits or wine, otherwise than as provided in this Act, except such beverages may be transported by the holder of any license authorized by section 18 of this Act, from and to express or freight depots to and from the premises covered by the license of the person so transporting distilled spirits or wine."

"§ 94. Penalties for Trafficking in Alcoholic Beverages Without a License.—Any person who, by himself or acting through another, directly or indirectly, shall violate the provisions of section 52 of this Act, shall be deemed guilty of a crime and, upon conviction; shall be punished by a fine of not less than \$100.00 and not to exceed \$5,000.00 or by imprisonment not to exceed five years, or by both such fine and imprisonment. For a second and each subsequent offense the offender, upon conviction, may be fined in a sum not less than \$500.00 and not to exceed \$10,000.00 or imprisoned for a term not to exceed ten years, or both so fined and imprisoned; provided, that in case the offender be a corporation, joint stock company, association or fiduciary, then the principal officer and/or the officer or officers responsible for such violation may be punished by such imprisonment."

"§ 95. Penalties for Violations of Other Sections of this Act.—Any person who, by himself or acting through another, directly or indirectly, shall violate the provisions of any section of this Act other than section 52 or sections 104 to 117 inclusive, for which a specific penalty is not provided, shall, for the first offense be deemed guilty of a misdemeanor and, upon conviction thereof, be punished by a fine not to exceed \$500.00 or by imprisonment in the County jail or workhouse for a term not to exceed six months; or by both such fine and imprisonment. For a second and each subsequent violation of the provisions of any section of this Act other than section 52, whether the section violated be that for which the first conviction was had or not, the offender, upon conviction, shall be punished by a fine not to exceed \$1,000 or by imprisonment for a term not to exceed one year, or by both such fine and imprisonment. The penalties provided for in this section shall be in addition to the revocation of the offender's license; provided, that in case the offender be a corporation, joint stock company, association or fiduciary, then the principal officer or officers responsible for such violation may be punished by such imprisonment. Nothing in this section shall be construed as conflicting with the penal provisions of section 10 of this Act."

"§ 119: Transfer of Functions and Resources of Division of Alcoholic Control from the Department of Business Regulation to the Department of Revenue. The functions of the Division of Alcoholic Control of the Department of Business Regulation are hereby transferred to the Department of Revenue. All books, papers, records, files, office equipment, other property and pending business of the said division are likewise transferred to and vested in the Department of Revenue. All employees whose functions are by this Act transferred to and vested in the Department of Revenue are hereby transferred, with their functions, to the said department. The remainder of the appropriation made for the operation of the Division of Alcoholic Control is hereby transferred to and vested in the Department of Revenue to be used for the administration of this Act. In connection with the transfer of the functions of the Division of Alcoholic Control of the Department of Business Regulation to the Department of Revenue, the said Department of Revenue shall be in every way the successor with respect to such functions, and to every act done in the exercise of such functions by or under the authority of the said division. In every instance in which the said division is referred to or designated in any law (not hereby repealed), contract or document, such reference or designation shall be deemed to refer to the Department of Revenue."

"§ 123. Declaring an Emergency.—The present uncertainty with respect to the law governing the sale, distribution and use of alcoholic beverages constitutes an emergency, and this Act shall become a law and be effective on its passage and approval by the Governor. Provided, however, that section 70 of this Act shall become effective as provided by the Constitution of Kentucky in the absence of a declaration of emergency; and provided further, that nothing in this Act shall be construed to require any licensee engaged in traffic in alcoholic beverages to pay any additional license tax, or procure any license hereunder, prior to the procurement of the license for the fiscal year 1938-39."

APPENDIX "C".

Pertinent provisions of KENTUCKY MOTOR VEHICLE TRANSPORTATION ACT OF 1932, AS AMENDED (being Chapter 104, pages 514, et seq., of 1932 Session Acts of General Assembly of the Commonwealth of Kentucky, approved March 17, 1932, and being Carroll's Kentucky Statutes, 1936 Edition, Sections 2739j-42, et seq., pages 1457, et seq., as amended by Session Acts of General Assembly of the Commonwealth of Kentucky, 1936 Fourth Extraordinary Session, Chapter 9, pages 105, et seq.; approved January 18, 1937, effective April 17, 1937, and being Section 2739j-42 of Baldwin's 1938 Supplement to Carroll's 1936 Kentucky Statutes, pages 239, et seq.)

"§ 2739j-42. Definitions.—(a) 'Motor Vehicle' means any motor propelled vehicle, not usually operated over or on rails, or not propelled by electric power obtained from overhead wires, while being operated within any municipality or where said vehicles do not travel more than five (5) miles beyond the limit of any municipality, used for the transportation on the public highways of this State of persons or property for hire, and shall include any such vehicle operated as a unit in combination with other vehicles for any such purpose;

"(b) 'Operator' means any person, firm, partnership, association, joint stock company, corporation, lessee, trustee, or receiver, appointed by any court whatsoever owning, controlling, operating or managing any motor vehicle used for the transportation of persons or property for hire;

"(c) 'Common Carrier' means any operator of a motor vehicle for hire in common carriage;

"(d) 'Contract Carrier' means any operator of a motor vehicle for hire other than a common carrier. 'Contract carrier' shall not be construed to mean or include any person, firm or corporation who transports only his own property, or who does not engage in the transportation business but makes occasional or casual trips to transport persons or the property of others for hire;

"(e) 'Public Highways' means every public street, alley, road or highway in this State, whether within or without the corporate limits of any municipality;

"(f) 'Certificate' means the certificate of public convenience and necessity authorized to be issued under the provisions of this Act;

"(g) 'Permit' means the permit to operate authorized to be issued under the provisions of this Act;

"(h) 'Commission' means the State Tax Commission of Kentucky."

"§ 2739j-45. Certificate necessary.—No common carrier shall operate any motor vehicle for hire for the transportation of persons or property on any public highway in this State without having obtained a certificate from the Commission."

"§ 2739j-46. Application for certificate, form, oath.—Every application for a certificate shall be made in such form and contain such matters as the Commission may prescribe, and shall be made under oath, signed by the applicant; or, if the applicant be not a person, then by a person having knowledge of the matters therein set forth and duly designated for that purpose by the applicant."

"§ 2739j-47. Granting certificates, procedure.—Upon the filing of any such application and the payment of the fee hereinafter prescribed, the Commission shall, within a reasonable time, fix the time and place for a hearing thereof. A written notice of such hearing, and of the right to file a protest in accordance with said Commission's requirements, shall be mailed by said Commission at least ten (ten) days before the hearing of such application to the applicant, to all common carriers (including steam and electric railway companies) serving any part of the route to be served by the applicant, to the Chairman of the State Highway Commission, to the county attorney and county judge of each county in which the applicant proposes to render service, and to any other person, firm or corporation who may, in the opinion of the Commission, be interested in or affected by the issuance of said certificate."

"§ 2739j-48. Hearing; protests may be filed.—At the time fixed in such notice, or at such time thereafter as the Commission may determine, a public hearing upon said application shall be held by said Commission. Any person, firm or corporation having an interest in the subject matter shall have the right, in accordance with the rules and regulations prescribed therefor by said Commission, to file a protest to the granting, in whole or in part of said application, to make representations, and to introduce evidence in support of said protest."

"§ 2739j-49. Issuing certificate; conditions may be attached; public hearing not necessary, when.—After such hearing the Commission shall have the power to issue to the applicant a certificate, in the form to be prescribed by said Commission, declaring that the public convenience and necessity require the operation for which application is made, or refuse to issue the same, or to issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the rights granted by such certificate such terms and conditions as, in its judgment, the public convenience and interest may require; provided, however, if no protest to the granting of the certificate be filed with said Commission prior to the date fixed for the hearing, and if said Commission is satisfied that the privilege sought by the applicant is convenient and necessary in the public interest the certificate may be granted without a public hearing."

"§ 2739j-50. Matters to be considered in granting or refusing certificate.—In granting or refusing to grant such certificate, the Commission shall take into consideration the effect that the proposed operation may have upon public transportation business and facilities of every character with the territory sought to be served by the applicant, the public need for the service the applicant proposes to render, the ability of the applicant efficiently to perform the service for which authority is requested, and the effect upon the highways and upon the safety of the public using such highways that will probably result from the granting of such application."

"§ 2739j-51. Convenience and necessity to public necessary; preference to certain operators.—No such certificate

shall be issued until the applicant has established to the satisfaction of the Commission, upon consideration of the matters mentioned in the preceding section, that the privilege sought by the applicant is convenient and necessary in the public interest. If two or more operators who have been engaged in the transportation of property for compensation, before this act becomes effective, apply for a certificate authorizing them to perform substantially the same service in the same territory under similar conditions, and if the said Commission shall be of the opinion that, in accordance with the provisions of this Act, certificates should be granted to some but not all of such applicants, preference shall be given to the operator or operators who have been longest engaged in such service, provided such service has been rendered in accordance with the requirements of the law."

"§ 2739j-54. Powers and duties of commission.—The Commission shall have the power and authority, by general order or otherwise, to prescribe rules and regulations governing common carriers; it shall have authority to fix or approve the rates, fares, charges, classifications, rules and regulations of each such common carrier, to regulate operating schedules so as to insure adequate and convenient transportation service, to prescribe a uniform system and classification of accounts to be used, to require the filing of annual and other reports, and to supervise and regulate such common carriers in all other matters in which the public interest is involved."

"§ 2739j-55. Abandonment or change of route.—No common carrier shall abandon or change any route or service without an order of the Commission that public convenience and necessity permit such abandonment or change. Applications for any such abandonment or change shall be made in accordance with the requirements of said Commission, and the procedure on an application for an abandonment or change of route shall be the same as herein provided for the issuance of a certificate; provided, however, if it becomes necessary on account of the condition of the roads or other emergency, temporary changes in route, service and schedules may be made."

"§ 2739j-56. Rates to be reasonable.—Every rate demanded or received by any common carrier shall be just and reasonable."

"§ 2739j-57. Adequate service to be furnished.—Every common carrier shall furnish adequate, efficient, safe and reasonable service."

"§ 2739j-58. Schedule of rates etc., to be filed; open to public inspection.—Under such rules and regulations as the Commission may prescribe, every common carrier shall maintain on file with said Commission a schedule of the rates, fares, charges and classifications, if any, and a time schedule, if any, of all motor vehicles operated under the authority of said Commission, and shall keep open for public inspection at designated offices so much of said schedules, rates, fares, charges and classifications, as well as time schedules, as said Commission may deem necessary for public information."

"§ 2739j-59. Regular rates to be charged; refunds not permitted.—No common carrier shall charge, demand, collect or receive a greater or less or different compensation for the transportation of persons or property, or for any service in connection therewith, than the rates, fares and charges specified in its tariffs and classifications filed with and approved by said Commission and in effect at the time; nor shall any company refund or remit in any manner or by any device any portion of the rates, fares or charges so specified, nor make or give any unreasonable preference or advantage to any person; nor subject any person to any unreasonable prejudice or discrimination."

"§ 2739j-61. Fixing rates.—If the Commission, after a hearing held after reasonable notice upon its own motion or upon complaint, finds any existing rate or rates to be excessive, unreasonable or unjustly discriminatory, or the services rendered or the facilities employed by any common carrier to be unsafe, inadequate, inconvenient or in any wise in violation of law or the rules and regulations of said Commission, it may determine the just and reasonable rates to be charged thereafter, or the reasonable, safe,

convenient and adequate service to be thereafter furnished, and shall fix the same by order; provided, however, that nothing in this Act shall be construed to require the Commission to fix the same rates for motor carriers subject to this Act as are or may be fixed for carriers engaged in other methods of transportation."

"§ 2739j-62. Necessity for regulation of contract carriers declared.—It is hereby declared that the business of contract carriers is affected with the public interest, and that the safety and welfare of the public, the preservation and maintenance of the public highways, and the integrity of the regulation of common carriers require the regulation of contract carriers to the extent hereinafter provided."

"§ 2739j-63. Contract carriers to obtain permits.—No contract carrier shall operate any motor vehicle for hire for the transportation of persons or property on any public highway in this State without having obtained a permit from the Commission."

"§ 2739j-64. Application for permit, hearing.—Applications for permits shall be made in the manner and form provided for in the Commission's regulations and said Commission may, if it deems it advisable, require a public hearing to be held thereon, and in this event it shall give written notice thereof to all persons who may, in the opinion of said Commission, be interested in or affected by the issuance of such permit at least ten days prior to the time fixed for such hearing."

"§ 2739j-65. Issuing permit.—Upon the payment of fees hereinafter prescribed, the Commission shall have power to issue to the applicant a permit, in the form to be prescribed by said Commission, authorizing the operation for which application is made, provided the applicant has established to the satisfaction of said Commission that the privilege sought will not endanger the safety of the public or interfere with the public's use of the highways or impair the condition or maintenance of such highways."

"§ 2739j-94. Exemptions from act.—There shall be exempted from the provisions of this Act: . . . Two.

Motor vehicles for hire operating exclusively within the limits of a city or incorporated town, or within ten miles of its limits, Provided, however, that the operator of any such motor vehicle for the carriage of passengers, operating between any city or incorporated town and a point or points within ten (10) miles of the limits thereof, and over regular routes or between fixed termini, may apply to the commission for a Certificate. * * *

"§ 2739j-95. Act to apply to interstate commerce.—This Act and every part thereof shall apply and be construed to apply to interstate commerce, except insofar as the same may be in conflict with the provisions of the Constitution of the United States and the Acts of Congress."

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